ARAB-MALAYSIAN BANK BHD

v.

LIAN YIT ENGINEERING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-24-1260-1998]
11 NOVEMBER 1999

LAND LAW: *Sale of land - Order for - Cause to the contrary - National Land Code 1965, s. 256(3) - Failure to give details and particulars - Whether plaintiff can vary scheme of interest - Difference between erroneous sum and wrongful demand*

The plaintiff granted a financial facility of up to a maximum of RM4.5m to the 1st defendant. As security for the facility, each defendant charged its property in favour of the plaintiff. Upon default by the 1st defendant, the plaintiff applied for an order for sale for all three properties charged. On the hearing day, the defendants raised two issues to show "cause to the contrary" pursuant to s. 256(3) National Land Code 1965, *ie*, the failure of the plaintiff to specify the total amount due to the plaintiff at the date on which the order for sale was to be made and whether the plaintiff can vary the scheme of interest applicable to the facility unilaterally.

Held:

[1] The mere failure to give details and particulars as to the amount claimed did not raise a cause to the contrary pursuant to s. 256(3) National Land Code 1965.

[2] Whilst the plaintiff had an absolute discretion under the contract to vary the rate of interest, it had no right to vary the scheme of interest as a whole from BLR to cost of funds because both the schemes of interest were two distinct forms of interest which were calculated on different formulas.

[3] The defendant had shown that by arbitrarily changing the scheme of interest the plaintiff had acted contrary to both law and equity.

[4] This was not the case of a demand of an erroneous sum but the case of a wrongful demand. Such a demand would render the Form 16D Notice and the notice of demand ineffectual and thus invalid.

[Application dismissed.]

Case(s) referred to:
Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 256(3), 257(1)(c), 340
Rules of the High Court 1980, O. 83 r. 3(3)

Other source(s) referred to:
Osborn's Concise Law Dictionary, 8th edn

For the plaintiff - WK Cheah; M/s Abd Aziz Chen & Co
For the defendants - S Surendran; M/s Suren & Ragu

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

Facts

The plaintiff applied for an order for sale of the property charged by the 1st defendant. By a loan agreement dated 15 July 1995 and based on a letter of offer dated 12 June 1995 the plaintiff granted the 1st defendant an overdraft facility (1st OD facility) up to RM3 million. All three defendants then created three separate charges over three separate properties belonging to each of them respectively (the charged properties) as security towards the said 1st OD facility.

By a second loan agreement dated 21 May 1996 and based on a letter of offer dated 16 April 1996 the plaintiff granted the 1st defendant an Addition Overdraft Facility (2nd OD facility) of up to RM1.5 million. All three defendants then created three separate second legal charges over the same three properties belonging to each of them respectively as security towards the said 2nd OD facility.

Pursuant to the said arrangements the plaintiff granted to the 1st defendant a maximum of RM4.5 million as loan. Upon default by the defendants the plaintiff now seeks by way of this originating summons, an order for sale together with consequential orders. There was also a prayer for vacant possession. However the plaintiff has since withdrawn this prayer.

Findings Of The Court

On the day of the hearing and in the course of his submission counsel for the defendants urged me to allow him the opportunity to call a witness from Bank Negara to give expert evidence on the meaning of "Cost of Fund Scheme" because the plaintiff had, by way of its letter dated 2 March 1998 to the 1st defendant, indicated that the OD facilities for RM4.5 million were "to be pegged against the higher of Cost of Fund ("COF")/ Base Lending Rate (BLR)". Since counsel for the plaintiff had no objections, I allowed the application. One Mr. Tan Keat Lin, the manager of the Regulations Department of Bank Negara Malaysia, testified. His evidence was that with regard to lending rates, Bank Negara has one main scheme, which is that all loans are to be priced at the margin above the BLR. There are however three exceptions allowed, namely, if the lending rates are prescribed by law or by Bank Negara or if they are priced on a cost added basis. He explained that the rate of BLR is calculated with reference to a ceiling set by Bank Negara which in turn is calculated with reference to a formula which has been prescribed by Bank Negara. He was then asked to explain cost of funds which in Bank Negara is referred to as Costs Plus. For the scheme of interest to be calculated on costs of funds there was a requirement of a condition that there ought to be a reference to a specified source of funds which the bank can actually identify as the source from which it has been funding the loan. Once this has been shown then there is no formula prescribed by Bank Negara for the bank to calculate what is its cost of funds. However, the banks would normally calculate the cost of funds according to the interest paid on the funds whilst adjusting for statutory reserve liquidity costs and administrative costs as well. He agreed with a suggestion of the defence that the scheme of interest on the BLR is completely different from the scheme of interest on the cost of funds in that the method of computation for the BLR is explicitly guided by Bank Negara whilst the scheme of interest on the cost of funds is at the free discretion of the bank concerned. To a question as to whether a bank could on its own change the BLR rate to cost of funds rate he said it could not because since the bank ought to identify the source of funding for the implementation of the cost of funds rate, the bank ought to have known the source from the outset and thus the cost of funds rate ought to have been implemented from the time the loan agreement was signed. He even suggested that the bank would have to answer a query from Bank Negara if there was a complaint from a customer as to why the bank was only able to identify the source of funds at such late stage and not earlier. As to which of the two schemes had the higher rate of interest he opined that it could be either, depending on the market situation.

The defendants raised two issues to show 'cause to the contrary' pursuant to s. 256(3) of the National Land Code (NLC) to stop this application for an order for sale.

(1) Non-fulfilment Of The Requirement Of Section 257(1)(c) Of The NLC

The defendants argued that notwithstanding the fact that the plaintiff had withdrawn its prayer for vacant possession, the plaintiff must still specify the total amount due to the chargee at the date on which the order for sale was to be made. Whilst conceding that pursuant to O. 83 r. 3(3) of the Rules of the High Court 1980 (the RHC) where the plaintiff claims delivery of vacant possession, the affidavit in support must contain particulars of the amount of the advance, the amount of the repayments, the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit, and the amount remaining due under the charge, the defendants argued that it is the spirit and intention of Parliament to require that all such particulars be given, in respect of applications made pursuant to s. 256 of the NLC read together with s. 257. It is therefore necessary to reproduce both the said sections which read as follows:

256. Application to court for order for sale.

(1) This section applies to land held under:

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

257. Matters to be dealt with by order for sale.

(1) Every order for sale made by the Court under section 256 shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made; and

The defendants relied heavily upon the decision of Mahadev Shankar J (as he then was) in *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 where he held that the objective of O. 83 r. 3 of the RHC is to enable the defendant to know at least by the date of the filing of the originating summons, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order "the total amount due to the chargee at the date on which the order is made". Since these words are from s. 257(1)(c) of the National Land Code 1965 and thus mandatory, the defendants argued that the learned judge had therefore interpreted O. 83 r. 3 of the RHC in the spirit and intent of the legislation as contained in s. 257 of the NLC. The defendants further argued that despite the fact that s. 257 does not provide for specific provisions requiring particularisation of accounts as compared with O. 83 r. 3 of the RHC, the mandatory requirements of particularisation as provided for under O. 83 r. 3 of the RHC in respect of an order for delivery of vacant possession of the property should be equally applicable in respect of an application for an order for sale under s. 257 of the NLC.

I do not accept this argument. The Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 has restricted the interpretation of 'cause to the contrary' by setting out three categories of cases, namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

Under this first issue raised, the defendant merely attempts to show that the plaintiff chargee had failed to give details and particulars. Holding that such an attempt by the chargor to resist an application for an order for sale was an act challenging the indefeasibility of the chargee's right to the land, that is, a right in rem, the Federal Court in *Low Lee Lian* went on to hold that an allegation that the chargee acted in breach of contract, whilst giving rise to an independent action *in personam* is insufficient per se to defeat the *ad rem* rights of a chargee under his registered charge, to an order for sale. Gopal Sri Ram JCA in delivering the judgment of the Federal Court said at p. 88:

> On no account should he (the Judge) express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.

He added at p. 89 as follows:

> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action *in personam* that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.

In the circumstances, based on the decision of the Federal Court which binds me, I reject the first issue raised by the defence, and hold that a mere failure to give details and particulars does not raise a 'cause to the contrary' pursuant to s. 256(3) of the NLC.

(2) Can The Plaintiff Claim Interest Not Provided For Expressly Or Impliedly In The Facility Agreement

The loan agreements show clearly that the term or condition in respect of both the loan facilities granted by the plaintiff to the 1st defendant imposed interests which were calculated on the Scheme of Interest according to the BLR. I find that the plaintiff had acted unilaterally when it varied the Scheme of Interest on the said loan facilities without first obtaining the prior consent of the defendants, contrary to the executed loan agreements. The plaintiff had varied from the Scheme of Interest based on the BLR to the Scheme of Interest based on cost of funds.

The plaintiff relied on the relevant clause in the first loan agreement giving the plaintiff the right to vary at its absolute discretion such rates of interest including the default interest or other bank charges (which variation may take place by either varying the BLR or the margin or both in the manner or mode of computation or charging or howsoever) in the manner hereinafter set out:

> (a) in respect of any variation of the Base Lending Rate, by placing in one issue of a daily national newspaper of the Bank's choice a general notice of change of the Base Lending Rate addressed to the public generally and the variation shall take effect on the date specified therein or by serving a notice on the Borrower; and
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> (b) in respect of any variation of the Margin or the Default Rate or the rate of commissions, discount charges or other bank charges or otherwise, by serving a notice in writing to the Borrower.

The second loan agreement also gave the plaintiff the right "at any time and from time to time to vary at its absolute discretion the margin and/or the BLR and/or the rate of interest applicable to the OD facility by serving on the borrower of such its intention in the following manner:

> 7.3.1 in respect of the BLR of the Bank, by placing in one of a daily newspaper of the Bank's choice a general notice of change of the BLR of the Bank addressed to the public generally or by serving a notice in writing on the Borrower, and
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> 7.3.2 in respect of the Margin and/or the provisions relating to the rate of interest provided for under Clause 7.5.1 by serving a notice in writing on the Borrower of the change; and
>
> such amended rate of interest shall be applicable as from the date specified in such notice, service of such notice shall be deemed to be sufficiently given and served on the Borrower, if despatched by personal delivery or sent by ordinary post to the address therein stated.

Whilst I agree that the plaintiff has the absolute discretion to vary the rate of interest, such discretion is only limited to varying the rates of the interest as provided under the prescribed rate of the existing facility agreements which is the scheme of interest based on the BLR. The plaintiff had no right to vary the scheme of interest as a whole from BLR to cost of funds because both the schemes of interest are two distinct forms of interest which are calculated on different formulae. I accept the evidence of the expert from Bank Negara who stated that the rate of BLR is calculated with reference to a ceiling set by Bank Negara Malaysia which

in term is calculated by reference to a formula which has been presented by Bank Negara Malaysia. In so far as the scheme of interest of the cost of funds is concerned he emphasised that there was a requirement of a condition that there ought to be a reference to a specified source of funds which the bank can actually identify as the source from which it has been funding the loan. Once this has been shown, then there is no formula prescribed by Bank Negara for the bank to calculate what is its cost of funds. He even agreed that a bank could not on its own change from the BLR rate of interest to the cost of funds scheme of interest. I cannot ignore the fact that the BLR scheme of interest is absolutely controlled by Bank Negara whilst the cost of funds scheme of interest is completely at the discretion of the bank.

To my mind, this is clearly the type of situation envisaged by the Federal Court in *Low Lee Lian* in its third category of showing 'cause to the contrary'. I am satisfied that the defendant has shown that by arbitrarily changing the scheme of interest, the plaintiff has acted contrary to both law and equity. In *Low Lee Lian*, the Federal Court held that whilst the failure on the part of the chargee to prove the making of a demand of service upon the chargor of a notice in Form 16D would constitute 'cause to the contrary', it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh. However, in the present case since the calculation of interest is based on a totally different scheme of interest, contrary to that agreed upon by the parties, no rectification can be made. The plaintiff had crossed the Rubicon, so to speak. It is clearly unconscionable of the plaintiff to have agreed on one scheme for calculating the interest and later abandoning the same without reason or explanation and resorting to another totally different scheme for calculating the interest, unenvisaged by the parties from the outset. This to my mind falls in line with what was expressed by the Federal Court in *Low Lee Lian* at p. 86:

> ... He (the chargor) may, by establishing such an obligation of conscience, rely upon it to thwart an application under s. 256 of the Code.

As to whether there has been any breach of a law, suffice it for me to consider the evidence of the Bank Negara expert that a bank cannot resort to the scheme of interest based on cost of funds without first having identified the source of funds and that therefore since the source of the fund for the granting of the loan could well and truly have been identified from the outset, the plaintiff ought to have clearly stated in the loan agreement that it was relying on the cost of funds scheme of interest. This is not a case of a demand of an erroneous sum; this is a case of a wrongful demand. Such a demand renders the Form 16D Notice and the notice of demand ineffectual and thus invalid.

The plaintiff relied on cl. 1.1 relating to interest which reads:

> The Margin above the BLR on daily rest or **such other rate** as may be stipulated by the Bank from time to time and at any time pursuant to this Facility Agreement. (emphasis provided)

The plaintiff thus argued that the "Prescribed Rate" applicable to the facility in question is not restricted to the aggregate of the margin and the BLR of the plaintiff; it also could include any other rate of interest as to be determined by the plaintiff, thus implying that the plaintiff could adopt a different "scheme" as the basis for the computation of the "Prescribed Rate".

To my mind the words **such other rate** (emphasis provided) as stated in cl. 1.1 must be read *ejusdem generis*. The "such other rate" relates to the alternative to the daily rest to be calculated on the margin above the BLR and cannot refer to a totally different scheme of interest. The *ejusdem generis* rule of interpretation is that where particular words are followed by general words, the general words are limited to the same kind as the particular words. (See *Osborn's Concise Law Dictionary* 8th edn.) Nothing is more illustrative of this rule than the interpretation of the words "such other rate" as being *ejusdem generis* to interest calculated on "daily rest".

Since the defendant has shown cause to the contrary pursuant to s. 256(3) of the NLC, I hereby dismiss this application with costs.